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HELEIN & ASSOCIATES, P. C.

ATTORNEYS AT LAW

8180 GREENSBORO DRIVE
SUITE 700
MCLEAN, VA 22102

(703) 714-1300 (TELEPHONE)
(703) 714-1330 (FACSIMILE)
mail@helein.com (EMAIL)

WRITER'S DIRECT DIAL NUMBER: (703) 714-1300

WRITER'S DIRECT EMAIL ADDRESS: mail@helein.com

99-290

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September 8, 1999

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Ms. Magalie R. Salas
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: ***In the Matter of Communique Telecommunications, Inc. d/b/a Logicall Application for Review of the Declaratory Ruling and Order Issued by the Common Carrier Bureau - InterContinental Telephone Corp. Petition for Declaratory Ruling on National Exchange Carrier Association, Inc. Tariff F.C.C. No. 5 Governing Universal Service Fund and Lifeline Assistance Charges***
FCC 99-80

Dear Ms. Salas:

Enclosed herewith for filing are an original and eleven (11) copies of Communique Telecommunications, Inc. d/b/a Logicall and InterContinental Telephone Corp.'s Petition For Reconsideration in the above-captioned matter.

An additional copy of this letter and filing also is enclosed. Please date-stamp the extra copy and return it to the undersigned in the enclosed postage prepaid envelope.

Sincerely,

Charles H. Helein

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Communique Telecommunications, Inc.	)	
d/b/a Logicall	)	
Application for Review of the	)	
Declaratory Ruling	)	
and Order Issued by the	)	
Common Carrier Bureau	)	
	)	
InterContinental Telephone Corp.	)	FCC 99-80
Petition for Declaratory Ruling on	)	
National Exchange Carrier	)	
Association, Inc.	)	
Tariff F.C.C. No. 5	)	
Governing Universal Service Fund	)	
and Lifeline Assistance Charges	)	

PETITION FOR RECONSIDERATION OF COMMUNIQUE TELECOMMUNICATIONS, INC. D/B/A LOGICALL AND INTERCONTINENTAL TELEPHONE CORP.

Charles H. Helein
Harisha J. Bastiampillai
Helein & Associates, P.C.
8180 Greensboro Drive
Suite 700
McLean, Virginia 22102
(703) 714-1300

September 8, 1999

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SUMMARY

The Federal Communications Commission's sanction of the filing of tariffs by the National Exchange Carrier Association pursuant to Section 203 of the Communications Act is an *ultra vires* act which finds no support in the language of Section 203 nor in the language of Title II of the Act. The Commission's Order represents the latest in a long line of situations where the Commission has acted contrary to statutory language and legal precedent in regard to its powers pursuant to Section 203. The alteration of the tariff filing regime effected by the Commission's actions, i.e., allowing a non-common carrier the benefits of filing tariffs without the attendant responsibilities, greatly upsets the dynamic of the tariffing framework effected by Congress and enforced by the courts.

Before the
Federal Communications Commission
Washington, D.C. 20554

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	)	
Communique Telecommunications, Inc.	)	
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National Exchange Carrier	)	
Association, Inc.	)	
Tariff F.C.C. No. 5	)	
Governing Universal Service Fund	)	
and Lifeline Assistance Charges	)	

PETITION FOR RECONSIDERATION

Communique Telecommunications, Inc. ("CTI") and InterContinental Telephone Corp. ("ICTC") (hereinafter referred to as "Petitioners") pursuant to Section 1.429 of the Commission Rules, 47 C.F.R. § 1.429, hereby respectfully request that the Commission reconsider its Memorandum Opinion and Order, FCC 99-80 (released August 9, 1999)("Order") in the above-referenced proceeding. Specifically, Petitioners request that the Commission reconsider its decision to allow a non-common carrier, the National Exchange Carrier Association ("NECA") to file tariffs pursuant to Section 203 of the Communications Act of 1934, *as amended*, 47 U.S.C. § 203.

Background

In 1983, the Federal Communications Commission ("FCC" or "Commission")

established a system of tariffed charges for the recovery by local exchange carriers ("LECs") of the costs they incur in the origination and termination of interstate telephone calls. The FCC directed the creation of the National Exchange Carrier Association ("NECA") to prepare access charge tariffs, distribute access charge revenues, and administer programs for the recovery of carrier common line charges (CCL), subscriber line charges and other access charges. These actions would be taken on behalf of LECs that chose to join in the tariff filed on their behalf by NECA. After the FCC created the universal service fund (USF), NECA was chosen to administer this program as well.

NECA filed a tariff which contained the access charges and the USF charges. LECs had the option to participate in the NECA tariff. The tariff included self-help provisions that authorized the LECs to refuse to provide existing or new access services or to disconnect access service to interexchange carriers based on non-payment of USF and LA (Lifeline Assistance) charges. Interexchange carriers ("IXCs") were assessed separate USF and LA charges if they had .05 percent or more of the total nationwide subscriber lines that are presubscribed to IXCs for 1+ service. The tariffs of LECs that did not participate in the NECA tariff often cross-referenced the USF and LA provisions.

On April 21, 1993, Communique Telecommunications, Inc. ("CTI") filed a Petition for Declaratory Ruling contending that the National Exchange Carrier Association ("NECA") did not have authority to file tariffs on behalf of its member LECs and CTI also requested abatement of the self-help provisions. The Common Carrier Bureau denied CTI's petition and found NECA is authorized under the Commission's rules to file tariffs and to bill and collect USF and LA charges. The Bureau found that NECA could do this as an agent of the member LECs. The

Bureau denied CTI's request to prevent the LECs from enforcing the self-help provisions and declined to address the issue of the lawfulness of the self-help provisions finding that such an issue should be reserved for an actual complaint proceeding. CTI filed an application for review of this ruling in June 1995.

On May 5, 1994, InterContinental Telephone Corp. ("ICTC") filed a petition for declaratory ruling contending that NECA did not have the authority to tariff, bill, collect or institute any form of collection procedure against ICTC in connection with the USF and LA charges contained in NECA's tariff. Both companies refused to pay the USF and LA charges.

Claims

Petitioners claimed that NECA is not authorized under the Communications Act to act as a tariff filing agent and to file tariffs. Petitioners also claimed that NECA cannot bill and collect the charges nor can it enforce the self-help measures. The main argument is that only common carriers may file tariffs. The companies cited two cases, *MCI Telecommunications Corp. v. FCC*, 765 F.2d 1186 (D.C. Cir. 1985)("*MCI Telecommunications Corp.*") and *Southwestern Bell Corp.v. FCC*, 43 F.3d 1515 (D.C. Cir. 1995)("*Southwestern Bell Corp.*"), by the U.S. Circuit Court of Appeals for the District of Columbia where the court required the Commission to apply only the "express language and clear meaning" of Section 203, which is the section of the Communications Act that authorizes the filing of tariffs by common carriers.

The companies also cited a ruling by the U.S. Supreme Court in *Reiter v. Cooper*, 507 U.S. 258 (1993)("*Reiter*") to challenge the lawfulness of the self-help provisions arguing that self-help remedies may not be invoked when the reasonableness of the underlying rate is being challenged.

Petitioners also stated that NECA's exoneration of another carrier for nonpayment of USF and LA charges calls for exoneration of the charges for other IXCs. Furthermore, the companies challenged the impropriety of the exemption of NECA from formal complaints. The companies also challenged the impact of the charges on small carriers and the lack of an correlation between the funds raised by the charges and the needs of providing universal service. The USF and LA charges were also challenged as an unlawful tax. Finally, the companies challenged the authority of the Common Carrier Bureau to decide novel issues.

NECA's main retort was that the USF and LA programs were a matter of settled law and policy for years.

Commission Ruling

Tariff issue

The FCC held that the LECs were in fact the issuing carriers of the tariff and that in filing the tariff, NECA is carrying out its duty as an agent under the Commission's rules. The FCC found that NECA was not usurping the functions of a common carrier, but rather acting as an administrative agent. The FCC also found the use of tariff filing agents to be consistent with Section 203 of the Act, with long-standing industry practice and with the Commission's authority under section 4(I).[1]

In regard to section 203, the FCC argues that the section establishes a role for agents in tariff filing. The basis of this finding is the fact that the Act allows for connecting carriers to be exempt from the tariff filing requirement and obligates an issuing carrier to show all charges for

[1] Gives the FCC power to issue orders that are necessary to the performance of their statutory functions.

both itself and any connecting carrier. Thus, the issuing carrier is, in effect, acting as an agent for the connecting carrier. Furthermore, the FCC argues, section 203 also allows the FCC to modify any requirement of section 203, including the tariff filing requirement, for "good cause shown." The FCC fails to proffer any basis for this good cause.

The FCC next looked to longstanding industry practice. Common carriers, it argues, have employed agents to file tariffs since 1934. The agent from 1934 to 1983 was, of course, AT&T which served as the "agent" for the entire industry. Since 1983, the Commission has authorized NECA to be a tariff filing agent.

The Commission finally turned to the purportedly broad language of sections 4(I) and 203(b)(2). These sections give the Commission the discretion to issue orders necessary to the exercise of their statutory authority and to issue exemptions from the tariff filing requirement for good cause shown. The FCC finds tariff filing agents necessary because they reduce burdens on both carriers and the Commission and facilitates compliance with section 203.

Authority to Bill and Collect Charges

The Commission rejected the claim that NECA is not allowed to bill and collect charges finding that nothing in section 203 prohibits carriers from using agents to enforce provisions of their tariffs. The Commission found this to be a primarily mechanical function often conducted by agents and cited the IXC use of LECs and private billing companies to bill and collect for them. The Commission also rejected the argument that NECA should be precluded from billing and collection given its exemption from complaint liability stating that there is no "statutory entitlement to a perfectly balanced regulatory scheme." This notion of symmetry in ratepayer and carrier remedies, the FCC argues, is not embodied in the Act. The FCC also asserted that

complaints could be filed against NECA's principals, the LECs, for any violations of the Act.

Self-Help provisions

The FCC declined to rule on the lawfulness of the self-help provisions. The FCC noted that no LEC has threatened any remedial actions to force collection of the charges. If a LEC does do this, the FCC states that the companies can file a formal complaint and put in issue the lawfulness of the provisions. The Commission stated that it prefers to make determinations as to lawfulness of tariff provisions in complaint proceedings or tariff investigations as opposed to declaratory ruling petitions.

The FCC also rejected the argument that LECs are precluded from invoking the self help provisions because the lawfulness of the underlying charge is being challenged. The FCC invokes the filed tariff doctrine in stating that effective tariff provisions are binding both upon the carrier and the customers until the Commission or a court finds them to be unlawful. The tariffed rate, thus, is the legal rate, while not necessary being an lawful rate. A finding that the rate is unreasonable by the FCC or a court would disentitle the carrier to collection of that rate. The FCC interpreted a prior Supreme Court ruling as merely giving the customer a right to have its claim that the filed rate is unlawful adjudicated at the same time the carrier seeks judicial or administrative enforcement of a filed rate.

Other issues

The FCC also rejected arguments that NECA's exoneration of another carrier for the charges had any implication to this situation. The FCC deemed that the companies failed to show any detrimental reliance on the exoneration of Allnet. The FCC argued that the failure to

pay one's lawful debts does not constitute detrimental reliance.[2]

The FCC also chose to disregard challenges to the USF funding mechanism. The FCC states that the USF funding mechanism is a reasonable means of promoting universal service. The FCC notes also that is in the midst of a comprehensive rulemaking that will replace the current high cost support mechanism with a forward looking cost methodology. Thus, the FCC argues it has in effect granted CTI/ICTC's request to revisit the USF policies and programs. But the FCC feels that since the USF was reasonable at the time that NECA tariffed the charges, that NECA's actions were reasonable.

The FCC also did not find any merit in the equal protection challenges to the USF and LA charges based on the disproportionate impact on small carriers. The FCC claims that a party bears a heavy burden to challenge regulations on equal protection grounds when no suspect classifications or fundamental rights are involved. The FCC employed the rational basis analysis which gives agencies broad deference when they engage in "a process of line drawing" in the area of economic regulation. Thus, the FCC argues, a line has to be drawn somewhere and some persons who have equally strong claims to favored treatments may end up on different sides of the line.

Analysis

The fundamental basis of the FCC's ruling is based on the premise that allowing NECA to file tariffs under Section 203 of the Communications Act is not an *ultra vires* utilization of the FCC's statutory authority. The FCC's position, which it defends to the hilt, is a position that

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[2] Note the incongruity of the FCC deeming the charges a lawful debt, while asserting earlier that a filed rate is merely legal and not lawful until reviewed by the FCC or a court.

rests on a house of cards, and it is a house with a very tenuous foundation. The FCC's ruling rests on the premise that NECA is allowed to file tariffs as a tariffing agent. If this premise is invalid, then all the attendant consequences that flow from the filing of tariffs, such as billing/collection and self help enforcement are eviscerated.

The FCC approaches this proceeding as if the concept of NECA filing tariffs is self-evident. A perusal of the language of Section 203, the section of the Communications Act that authorizes the filing of tariffs, offers no support to the position that non-carriers such as NECA may file tariffs. In fact, the language is unequivocal in its statement that it applies to common carriers. The language of section 203 when considered both on its own and in the context of Title II of the Act explicitly confines itself to common carriers. Section 203(a) states:

> Every ***common carrier***, except connecting carriers, shall, within such reasonable time as the Commission shall designate, file with the Commission and print and keep open for public inspection schedules showing all charges for itself and its connecting carriers . . .

47 U.S.C. § 203(a)(emphasis added).

The FCC's sanctioning of the filing of tariffs pursuant to Section 203 by a non-common carriers is clearly and unequivocally beyond the scope of its statutory authority. As the D.C. Circuit held in *MCI Telecommunications Corp.*, "the starting point for interpreting a statute is the language of the statute itself." *MCI Telecommunications Corp.*, 765 F.2d at 1194. The Supreme Court has held that ". . . an agency's interpretation of a statute is not entitled to deference when it goes beyond the meaning that the statute can bear." *MCI Telecommunications Corporation v. American Telephone and Telegraph Company*, 512 U.S. 218, 229 (1994)(citations omitted)("*MCI II*").

Thus, the language of the Act offers no help to the Commission. The section only speaks of common carriers. The FCC attempted to bypass this problem by analogizing to connecting carriers who do not file tariffs and who use another carrier as their agent to file tariffs. The fundamental flaw in this analogy is that a the carrier who the connecting carriers use as an agent is a common carrier itself, and, thus, covered by Section 203. NECA is a non-carrier. The Supreme Court has not countenanced the FCC's creative linguistics and does not grant the FCC any deference when the FCC's interpretation goes beyond what the language of the statute can bear.

The FCC relies on the longstanding industry practice and an amorphous public interest as their backdrop to their statutory arguments. In regard to long standing industry practice, the entity it cites as acting a tariffing agent prior to divestiture is AT&T, a common carrier. In the years after divestiture, the industry practice was the direct result of the FCC's rules authorizing NECA to file tariffs. Thus, the industry practice adds no illumination to the issue, and still begs the question of whether it is lawful for non-carriers to file tariffs. The FCC cannot establish an "industry" practice, which it did by allowing NECA to file tariffs, and then use this "practice" as a basis for showing the legality of the practice.

When the law fails the FCC, as it often does, it turns to the public interest. The public interest is often merely what the FCC deems to be in its best interest. In this case, it is the easing of the FCC's burdens through use of an agent filing tariffs for member LECs. The FCC fails to posit any reason why this practice benefits anyone other than the LECs and the FCC itself. Furthermore, courts have continually rejected FCC attempts to legislate its vision of the public interest through the language of Section 203(b)(2). Courts have only allowed limited

modifications of Section 203 requirements and do not allow the FCC to make any basic or fundamental changes to the regulatory scheme.

The D.C. Circuit noted in *MCI Telecommunications Corp.* that the word "modify" in Section 203(b)(2) suggests "circumscribed alterations – not, as the FCC now would have it, wholesale abandonment or elimination of a requirement." *MCI Telecommunications Corp.*, 765 F.2d at 1192; *see also*, *MCI II*, 512 U.S. at 228-232 (Section 203(b)(2) does not sanction fundamental changes to the Section 203 requirements no matter how meritorious those changes may be.) The court went on to add that ". . . under Section 203(b) the Commission may only modify requirements as to the form of, and information contained in, tariffs and the thirty day notice provision." *Id.* No matter how reasonable the FCC regulation may be, courts have held that they are "not at liberty to release the agency from the tie that binds it to the text Congress enacted." *Id.* at 1194

The FCC by allowing a non-common carrier to file tariffs under Section 203 is altering a core provision of the Communications Act. The Supreme Court has found the tariff filing provisions to be the heart of the common carrier section of the Act. *MCI II*, 512 U.S. at 230. Thus, the Court has scrutinized Commission actions very carefully. It is highly doubtful that courts would sanction what the FCC has done in the NECA context. The FCC is allowing a non-carrier to file tariffs, and to absorb all the benefits of filing tariffs, such as protection under the filed tariff doctrine, without attaching to NECA any of the responsibilities that go with tariffing, such as liability under the complaint provisions of the Act. The egregious consequences of such a modification of the tariffing regime are seen in this case where CTI and ICTC are aggrieved by NECA's actions, but can have no recourse against NECA through formal complaint proceedings.

Forcing CTI and ICTC to file actions against member LECs would not only be highly burdensome, but patently unjust given the fact that NECA is entity perpetrating the statutory violations. What the FCC terms as a lack of symmetry, i.e., the asymmetrical situation caused by the exemption of NECA from formal complaint liability, could prove fatal to the FCC position, as the courts would not lightly sanction such an imbalance.

Courts have gone to great lengths to protect the integrity of the tariffing regime and the FCC has often been admonished for actions that go beyond their authority. The courts often instruct the FCC to seek redress in Congress if the FCC wants to institute its version of the public interest. The D.C. Circuit has asserted that:

> [i]n enacting Sections 203-05 of the Communications Act, Congress intended a specific scheme for carrier initiated revisions. A balance was achieved after a careful compromise. The Commission is not free to circumvent or ignore the balance. Nor may the Commission in effect rewrite the statutory scheme on the basis of its own conception of the equities of a particular situation. 487 F.2d at 880. In sum, if the Commission is to have authority to command that common carriers not file tariffs, the authorization must come from Congress, not from this court or from the Commission's own conception of how the statute should be rewritten in light of changed circumstances.

MCI Telecommunications Corp., 765 F.2d at 1186.

The fundamental flaw in the premise on which the FCC bases its ruling will implicate the issues of self help provisions as well for if the provisions are unlawfully tariffed by a non-carrier, then NECA would have no basis to invoke them. The FCC was extremely shortsighted in failing to note that the issue ripe for declaratory ruling, i.e., the propriety of NECA filing tariffs, implicates all the other issues in the proceeding.

CONCLUSION

For these reasons, Petitioners respectfully requests that the Commission reconsider its ruling allowing for the filing of tariffs under Section 203 of the Communications Act by NECA.

Respectfully submitted,

By: _____
Charles H. Helein
Counsel for Petitioners

Of Counsel:
Harisha J. Bastiampillai
HELEIN & ASSOCIATES, P.C.
8180 Greensboro Drive, Suite 700
McLean, Virginia 22102
Telephone: (703) 714-1300
Facsimile: (703) 714-1330
Dated: September 8, 1999

Certificate of Service

I, Suzanne Helein, a secretary in the law firm of Helein & Associates, P.C. do hereby certify that on this 8th day of September, 1999, copies of the foregoing Petition for Reconsideration were delivered by first-class, postage pre-paid mail upon the following:

See Attached Service List

_____

Suzanne Helein

Certificate of Service

I, Suzanne Helein, a secretary in the law firm of Helein & Associates, P.C. do hereby certify that on this 8th day of September, 1999, copies of the foregoing Petition for Reconsideration were delivered by first-class, postage pre-paid mail upon the following:

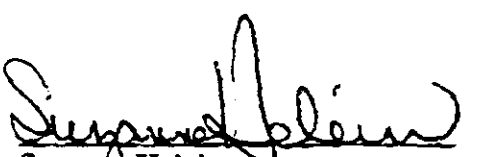
Richard A. Askoff
National Exchange Carrier Association, Inc.
100 South Jefferson Road
Whippany, New Jersey 07981

Dorothy Atwood
Chief, Enforcement Division
Common Carrier Bureau
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Deena Shetler
Enforcement Division
Common Carrier Bureau
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Jennifer Kashatus
Enforcement Division
Common Carrier Bureau
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Lawrence Strickling
Chief, Common Carrier Bureau
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554



Suzanne Helein